

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
77-6216

To be argued by
Richard L. Gold

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA and
CHARLES E. JORDAN, JR., Revenue
Agent, Internal Revenue Service,

Petitioner-Appellees,

against

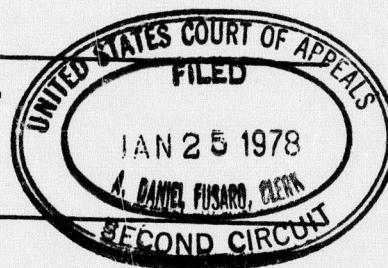
WILLIAM J. WERNEK,

Respondent-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF RESPONDENT-APPELLANT

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UNITED STATES COURT OF APPEALS

for th

SECOND CIRCUIT

Docket No. 77-6216

UNITED STATES OF AMERICA and
CHARLES E. JORDAN, JR., Revenue
Agent, Internal Revenue Service,

Petitioners-Appellees,

-against-

WILLIAM J. WERNER,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF RESPONDENT-APPELLANT

WILLIAM J. WERNER

PRELIMINARY STATEMENT

This is an appeal from a Memorandum and Order
of the Honorable Irving Ben Cooper, U.S.D.J., dated

November 17, 1977 (A-34)¹. Said Memorandum and Order has not yet been reported.

STATEMENT OF THE ISSUES

1. Whether the Fifth Amendment rights of Attorney-Respondent-Appellant William J. Werner's taxpayer-clients would be violated by the enforcement of an Internal Revenue Service Summons requiring the production of the cancelled checks of the taxpayer-clients for the tax years under investigation.

2. Whether Respondent-Appellant William J. Werner, as attorney for certain taxpayers and as the party summoned, has standing to assert the Fifth Amendment rights of his clients in opposition to the within application to enforce an Internal Revenue Service Summons.

3. Whether the Internal Revenue Service Summons, the enforcement of which was sought in this proceeding, was issued in bad faith, for an improper purpose and is, therefore, unenforceable.

4. Whether Judge Cooper should have enforced a Civil Subpoena served prior to the hearing in this matter held on March 15, 1977 on Petitioner-Appellee Charles E. Jordan, Jr.

¹ "A" denotes the Appendix, filed herewith.

and requiring Mr. Jordan to give testimony on behalf of the Respondent-Appellant William J. Werner and to bring with him all records and documents relating to the criminal liability or recommendation for criminal prosecution of the taxpayer-clients of Respondent-Appellant William J. Werner.

STATEMENT OF THE CASE

This is a proceeding under the Internal Revenue Code, 26 U.S.C.A. §§ 7402, 7602 and 7604, to enforce an Internal Revenue Service Summons served upon the Respondent-Appellant William J. Werner. Enforcement of the Summons was ordered by Judge Cooper in the Memorandum and Order from which this appeal is taken.

After the aforementioned Memorandum and Order was signed and issued, the Respondent-Appellant William J. Werner attempted to make an application by way of order to show cause, for relief under Rule 60(b) of the Federal Rules of Civil Procedure. The order to show cause was never signed and thereafter, this appeal was taken. Enforcement of the aforementioned Memorandum and Order of Judge Cooper has been stayed by stipulation of the attorneys for the parties pending the hearing and determination of this appeal and entry of a judgment thereon.

STATEMENT OF THE FACTS

The Respondent-Appellant William J. Werner (hereinafter "Werner") is an attorney at law in the State of New York (A-16). Werner and the law firm of which he is a member, Bandler & Kass, Esqs., are attorneys for John and Jeannine Ferrandi² (A-16).

Werner was retained by the taxpayers in March of 1975 as their attorney in connection with an Internal Revenue Service investigation of the taxpayers' tax liability, both civil and criminal, for the tax years 1970 through 1972 inclusive (A-16-17). Werner and his law firm were not the taxpayers' attorneys during the tax years in question nor did he or any member or associate of his firm or any firm with which he was ever connected prepare any of the taxpayers' income tax returns for any of the years in question or act as an accountant for the taxpayers (A-16-17).

In connection with his representation of the taxpayers, Werner requested and received from Ferrandi the cancelled checks drawn on his personal accounts. These records were delivered to Werner by Ferrandi to better enable Werner to give the taxpayers his legal advice (A-18-19).

Thereafter, the Government learned that Werner was in possession of the cancelled checks of Ferrandi which were drawn on Ferrandi's personal accounts. On October 15, 1976,

² John and Jeannine Ferrandi will hereinafter be referred to collectively as "the taxpayers". John Ferrandi, whose personal records the within Internal Revenue Service Summons (A-14) requires Werner to produce, will be referred as "Ferrandi".

Werner was served with the Internal Revenue Service Summons (hereinafter "the Summons"), the enforcement of which is sought in this proceeding (A-14). The Summons directed Werner to appear before the Petitioner-Appellee Charles E. Jordan, Jr., (hereinafter "Jordan") on October 26, 1976 to give testimony relating to the taxpayers' tax liability for the years 1970, 1971 and 1972 and to produce:

"All cancelled checks in [his] possession or control for the years 1970, 1971 and 1972 that were drawn on the accounts in the name of Mr. John Ferrandi, numbers 0740-10690 and 0740-14704, in the Manufacturers Hanover Trust Company, 699 Morris Park Avenue, Bronx, New York." (A-14).

It is Werner's understanding that the Government is not pressing its demand that Werner give testimony with respect to the taxpayers' tax liability for the years 1970, 1971 and 1972. Rather, the Government is only pressing its claim to have Werner produce the cancelled checks of Ferrandi which were summoned. Indeed, Judge Cooper's Order only requires Werner to "produce the records sought by the Government" (A-39); it does not require Werner to give testimony.

Werner failed to appear on October 26, 1976, the date on which the Summons was made returnable (A-7, 12 and 14). Four and one-half months later, the Petitioners-Respondents herein instituted this proceeding by way of order to show cause (A-4) to compel Werner to comply with the summons. The Petition

for enforcement of the Summons (A-6) alleged Werner's failure to appear in response to the Summons and that compliance with the Summons is necessary to the Government's investigation of the taxpayers' tax liability and "to a determination of the existence of fraud..." (A-8). Jordan's affidavit in support of the order to show cause (A-11) alleged that there was no outstanding or pending recommendation for criminal prosecution of the taxpayers (A-13).

In December of 1975, Werner had been advised by letter from Regional Counsel of the Internal Revenue Service (A-20) that "...after a review of the evidence presently available to the Government..." (A-20), the criminal investigation of Ferrandi's tax liability had been returned to the local Audit Division of the Internal Revenue Service. In response to the Petition for enforcement of the Summons, Werner asserted that the Government's letter was insufficient to dispell his reasonable belief that no recommendation for criminal prosecution of Ferrandi was outstanding (A-17-18). He, therefore, took the position that the Government was issuing the summons to solidfy its criminal case against Ferrandi, and that the Summons was issued for an improper purpose and in bad faith (A-17-18).

Werner also alleged that enforcement of the Summons would violate the taxpayers' Fifth Amendment rights which he

was asserting on their behalf by virtue of their attorney-client relationship. He further alleged that enforcement of the Summons would violate the taxpayers' Fourth Amendment rights against unreasonable searches and seizures, which he was asserting on their behalf by virtue of their attorney-client relationship. (A-18-19).³

Ferrandi also submitted an affidavit in response to the within Petition (A-21). In said affidavit, Ferrandi asserted and asked Werner to assert on his behalf his Fifth Amendment and other rights to which he was entitled, as well as the attorney-client privilege, in opposition to the Government's application to enforce the Summons.

The Government's order to show cause (A-4) was made returnable on March 15, 1977. On March 14, 1977, Werner's attorneys served a Civil Subpoena on Jordan (A-49-50). The Civil Subpoena commanded Jordan to appear at the hearing scheduled for March 15, 1977, to give testimony on behalf of

³ In the Court below, Werner also alleged that even without reference to any of the Constitutional privileges, the compelled production of the cancelled checks of Ferrandi was barred by the attorney-client privilege which he was asserting. This argument was premised on the allegation that delivery of the cancelled checks from Ferrandi to Werner was a confidential communication. This argument was rejected by Judge Cooper (A-38) and is not being pressed on appeal.

Werner, and to bring with him all records and documents relating to the criminal liability or recommendation for criminal prosecution of the taxpayers.

At the hearing on March 15, 1977 (A-23), Jordan failed to appear, give testimony, or produce the records or documents as required by the Civil Subpoena (A-27-28). During the hearing, there was some debate as to whether the Civil Subpoena served on Jordan would be enforced by the Court (A-29f). Judge Cooper asked Counsel for the Government to send Werner's attorneys a letter indicating the status of any criminal investigation of Ferrandi's tax liabilities (A-30f.). Judge Cooper hoped that such a letter would obviate the need for enforcing the Civil Subpoena served on Jordan (A-31f.). On that note, the hearing of March 15, 1977 was closed and no ruling on the enforceability of the Civil Subpoena served on Jordan had been made by Judge Cooper (A-32-33).

Counsel for the Government, William J. Kelleher, Jr. (hereinafter "Kelleher"), sent the letter as Judge Cooper had requested (A-51). In response, Werner's attorneys sent a reply letter stating their objections to Kelleher's letter and again asserting the need to examine Jordan and the relevant records and documents (A-53).

Thereafter, and before any subsequent hearing in this proceeding was held, Judge Cooper issued the Memorandum and Order, dated November 17, 1977, from which this appeal is taken (A-34). As Judge Cooper noted in footnote 1 to his Memorandum and Order, an earlier disposition of the case was prevented by an office error and was not the fault of either of the parties (A-34).

The Memorandum and Order directed Werner to produce the cancelled checks of Ferrandi which were summoned within ten (10) days after service of a copy of said Memorandum and Order (A-39). Judge Cooper rejected the Constitutional claims advanced by Werner on behalf of the taxpayers, as well as the claim of attorney-client privilege which was proffered (A-35-38). The Memorandum and Order made no mention about the issue of the enforceability of the Civil Subpoena served on Jordan, but the parties are in agreement that Judge Cooper's Order, directing compliance with the Summons prior to giving Werner's attorneys an opportunity to examine Jordan and the relevant records and documents, constitutes an implicit refusal to enforce the said Civil Subpoena.

Before the expiration of the time within which Werner was given to comply with the Summons, Werner's attorneys

attempted to bring on by way of order to show cause (A-40) an application to relieve Werner from Judge Cooper's Memorandum and Order. The relief was sought pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. In support of the application, Werner's attorneys advanced the same arguments which had previously been advanced with respect to the claims of Constitutional privilege and on the issue of the enforceability of the Civil Subpoena served on Jordan (A-43f.). Werner's attorneys also brought to Judge Cooper's attention the fact that during the interim between the hearing of March 15, 1977 and the issuance of Judge Cooper's Memorandum and Order dated November 17, 1977, the taxpayers had received a Notice of Deficiency for the tax year 1972 (A-58) and had petitioned in Tax Court for a redetermination of the alleged deficiency (A-55). It was argued that on the basis of these documents the cancelled checks of Ferrandi which were summoned were not needed by the Government, at least with respect to its investigation of the taxpayers' tax liability for the year 1972 (A-44-45).

Werner's attorneys advised Judge Cooper and Counsel for the Government that the application for Rule 60(b) relief would be made. Judge Cooper scheduled a conference with the attorneys for the parties prior to signing the order to

to show cause.⁴ At the conference Judge Cooper indicated that he was not inclined to sign the order to show cause brought on by Werner's attorneys. At that point, the attorneys for the parties agreed to a stay of the execution of Judge Cooper's Memorandum and Order enforcing the Summons pending the hearing and determination of this appeal and entry of a judgment thereon.

At that point, the appellate proceedings were commenced by the timely filing of a Notice of Appeal (A-63). Since unsigned orders are not generally made part of the record on appeal and in order to have the record on appeal contain all relevant documents, the attorneys for the parties stipulated to the addition of the unsigned order to show cause brought by Werner attorneys and its supporting documents to the record on appeal (A-65).

SUMMARY OF THE ARGUMENT

1. The Fifth Amendment rights of Attorney-Respondent-Appellant William J. Werner's taxpayer-clients, would be violated by the enforcement of an Internal Revenue Service Summons requiring the production of the cancelled checks of the taxpayer-clients for the tax years under investigation.

⁴ No record was made of this conference.

2. Respondent-Appellant William J. Werner, as attorney for certain taxpayers and as the party summoned, has standing to assert the Fifth Amendment rights of his clients in opposition to the within application to enforce an Internal Revenue Service Summons.

3. The Internal Revenue Service Summons, the enforcement of which was sought in this proceeding, was issued in bad faith, for an improper purpose and is, therefore, unenforceable.

4. Judge Cooper should have enforced a Civil Subpoena served on Petitioner-Appellee Charles E. Jordan, Jr. prior to the hearing in this matter held on March 15, 1977, and requiring Mr. Jordan to give testimony on behalf of the Respondent-Appellant William J. Werner and to bring with him all records and documents relating to the criminal liability or recommendation for criminal prosecution of the taxpayer-clients of Respondent-Appellant William J. Werner.

THE ARGUMENT

POINT I

ENFORCEMENT OF THE SUMMONS HEREIN WOULD
VIOLATE THE FIFTH AMENDMENT RIGHTS OF
THE TAXPAYERS AND WERNER HAS STANDING TO
ASSERT THE TAXPAYERS' FIFTH AMENDMENT RIGHTS.

A. ENFORCEMENT OF THE SUMMONS HEREIN WOULD VIOLATE THE FIFTH
AMENDMENT RIGHTS OF THE TAXPAYERS.

The Summons, the enforcement of which is sought in
this proceeding, requires Werner to produce:

"All cancelled checks in [his]
possession or control for the years 1970,
1971 and 1972 that were drawn on the accounts
in the name of Mr. John Ferrandi, numbers
0740-10690 and 0740-14704, in the Manufacturers
Hanover Trust Company, 699 Morris Park Avenue,
Bronx, New York." (A-14).

The cancelled checks came into Werner's possession
at his request in his capacity as attorney for the taxpayers.
The cancelled checks were delivered to Werner to better enable
him to give his legal advice to the taxpayers. See, generally,
STATEMENT OF THE FACTS, supra.

Werner respectfully submits that Ferrandi would be
privileged from producing these cancelled checks if he had
retained possession of them and if the Summons were directed to
Ferrandi. Werner contends these cancelled checks constitute

the private papers of Ferrandi and that his Fifth Amendment right against self-incrimination would cloak Ferrandi with a privilege to prevent their compelled production pursuant to such an Internal Revenue Service summons.

The Supreme Court of the United States has held:

"The 'historic function' of the privilege [against self-incrimination] has been to protect a 'natural individual from compulsory incrimination through his own testimony or personal records'". Bellis v. United States, 417 U.S. 85, 89-90, 40 L. Ed.2d 678, 94 S. Ct. 2179 (1974), quoting from United States v. White, 322 U.S. 694, 701, 88 L.Ed. 1542, 64 S. Ct. 1248 (1944)." Andresen v. Maryland, 427 U.S. 463, 470-471, 96 S. Ct. 2737, 49 L.Ed.2d 627, 636-637 (1976).

In United States v. White, 322 U.S. 694, 64 S. Ct.

1248, 88 L.Ed 1542 (1944), the Supreme Court, in discussing the coverage of the Fifth Amendment, stated:⁵

"[The Fifth Amendment] is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and

⁵ In United States v. White, *supra*, the Supreme Court held that a labor union official cannot assert his Fifth Amendment rights in refusing to produce the books and records of the labor union, a third party. The books and records were found not to be the private or personal records of the union official.

authenticate any personal documents or effects that might incriminate him." 322 U.S. at 698, 88 L. Ed. at 1546.

* * *

"[The Fifth Amendment] protects the individual from any disclosure, in the form of oral testimony, documents, or chattels, sought by legal process against him as a witness....

"...the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. *Boyd v. United States*, [citation omitted] ..." 322 U. S. at 699, 88 L.Ed at 1546.

The Supreme Court has always broadly construed the protection of the Fifth Amendment to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. This protection does not merely encompass evidence which may lead to a criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to a prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. Maness v. Meyers 419 U. S. 451, 461, 95 S.Ct. 584, 592, 42 L. Ed. 2d 574 (1975); Hoffman v. United States, 341 U. S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951); In re Friedman, 104 F. Supp. 419 (S.D.N.Y.1952)

(Weinfeld, J.). If the evidence in question will only tend to incriminate an individual, that person is nevertheless protected by the Fifth Amendment from being compelled to produce it.

Emspack v. United States, 349 U.S. 190, 75 S.Ct. 687, 99 L.Ed.997 (1955).

If there ever was a question, it should now be clear that Ferrandi's Fifth Amendment rights would protect him in a proceeding, such as the instant one, to enforce an Internal Revenue Service summons. In Kastigar v. United States, 406 U.S. 441, 444-445, 92 S.Ct. 1653, 32 L. Ed.2d 212, 217 (1972), the Supreme Court stated:

"[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."

The Second Circuit has explicitly held that a claim of Fifth Amendment privilege is sustainable to prevent the production of an individual's private papers in a proceeding to enforce an Internal Revenue Service summons. United States v. Silverstein, 314 F.2d 789 (2nd Cir. 1963), cert. den. 374 U.S. 807, 83 S.Ct. 1696, 10 L.Ed.2d 1031 (1963). That holding is implicit in the Supreme Court cases of Fisher v. United States, 425 U.S.

391, 96 S.Ct. 1569, 48 L. Ed.2d 39 (1976) and Couch v. United States, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973), which will be discussed in greater detail in POINT I, sub.B., infra.

Although, Jordan has alleged that there is no outstanding or pending recommendation for criminal prosecution of the taxpayers (A-13), even a civil tax investigation has quasi-criminal elements. In a civil tax case, a substantial penalty may be imposed on a taxpayer if he is found to have underpaid his taxes due to fraud. 26 U.S.C.A. §6653 (b); cf., One 1958 Plymouth Sedan v. Pennsylvania, 380 U. S. 693 (1965). Indeed, the Petition herein admits that the Government is investigating the existence of fraud in the taxpayers' tax returns (A-8).

Since the Supreme Court's decision in Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746 (1886), the law has been clear that the Fifth Amendment protects more than just compelled oral testimony or evidence. Although, the "mere evidence" rule of Boyd v. United States, supra, has eroded through the years, Werner submits that, despite this erosion, the cancelled checks of Ferrandi would still be within the scope of Fifth Amendment protection enjoyed by Ferrandi.

The cancelled checks are Ferrandi's personal and private records and if they were in his possession, their

production and its communicative aspects could not be compelled from him. United States v. Judson, 322 F. 2d 460 (9th Cir. 1963). Cf., United States v. White, supra, Bellis v. United States, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974); United States v. Miller; 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d (1976); and California Bankers Association v. Shultz, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974).

In addition to disclosing the contents of the documents, the problem with forcing a taxpayer to turn over his private records, such as his cancelled checks,⁶ is that he is forced to authenticate them and thus to supply an incriminating link in the chain of evidence against him. Fisher v. United States, 425 U.S. at 429, 48 L.Ed.2d at 66 (Brennan, J., concurring); Maness v. Meyers, supra; Hoffman v. United States, supra; In re Friedman, supra; Curcio v. United States, 354 U.S. 118, 125, 77 S.Ct. 1145, 1 L.Ed.2d 1225, 1231 (1957). In this regard, this case is distinguishable from the cases holding that an individual's Fifth Amendment rights do not

⁶ It is submitted that the taxpayers' cancelled checks herein are no less their "private papers" than were the invoices of Mr. Boyd in Boyd v. United States, supra.

protect him from being compelled to give a handwriting exemplar,⁷
a voice exemplar⁸, or a blood sample.⁹ In those cases, it is
not the exemplar which incriminates the defendant, but the
testimony of an independent expert tying the defendant's exemplar
to the pre-existing incriminating evidence. The defendant in
those cases is not asked to supply the incriminating link or the evidence.

As Mr. Justice Brennan said in his concurring opinion
in Fisher v. United States, supra:

"The common-law and constitutional extension of the privilege to testimonial materials, such as books and papers, was inevitable. An individual's books and papers are generally little more than an extension of his person. They reveal no less than he could reveal upon being questioned directly." 425 U.S. at 420, 48 L.Ed.2d at 61.

"Non-business economic records in the possession of an individual, such as cancelled checks or tax records, would also seem to be protected. They may provide clear insights into a person's total life style." 425 U.S. at 427, 48 L.Ed.2d at 65 (emphasis supplied¹⁰).

⁷ Gilbert v. California, 388 U.S. 263, 265-267, 18 L.Ed.2d 1178 (1967).

⁸ United States v. Wade, 388 U.S. 218, 222-223, 18 L.Ed.2d 1149 (1967).

⁹ Schmerber v. California, 384 U.S. 757, 763-764, 16 L.Ed.2d 908 (1966).

¹⁰ The significance of Mr. Justice Brennan asserting that cancelled checks in the hands of the taxpayer would be

Werner asks this Court to hold, as did Mr. Justice Cardozo in People v. Defore, 242 N.Y. 13, 27, 150 N. E. 585 (1926):

"A defendant is 'protected from producing his documents in response to a subpoena duces tecum, for his production of them in court would be his voucher of their genuineness'. There would then be 'testimonial compulsion.'"

See also United States v. Beattie, 522 F.2d 267, 270 (2nd Cir. 1975) (Friendly, J) ("[a] subpoena demanding that an accused produce his own records is...the equivalent of requiring him to take the stand and admit their genuineness.").

The element of compulsion against Ferrandi which would be present in this instance can best be understood when this case is compared to Andresen v. Maryland, supra. There, the petitioner's private papers were seized by state officials pursuant to a search warrant. After a suppression hearing the trial court rejected Andresen's claim that his Fifth Amendment rights had been violated. The trial court reasoned that the searches and seizures did not force Andresen to be a witness against himself because he had not been required to produce the seized documents, nor would he be compelled to authenticate

afforded Fifth Amendment protection is made manifest by the fact that only the records of the taxpayer's accountant, and not the taxpayer's cancelled checks, were summoned in Fisher v. United States, supra.

them. Andresen v. Maryland, 427 U.S. at 467, 49 L.Ed.2d at 635.

In a footnote, the Supreme Court in Andresen v. Maryland, 427 U.S. at 473, 49 L.Ed.2d at 638, held that the risk of authentication is not present where the documents are seized pursuant to a search warrant. The Supreme Court stated:

"Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information, see Fisher v. United States, ..., a seizure of the same materials by law enforcement officers differs in a crucial respect - the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of evidence." 427 U.S. at 473-474, 49 L.Ed.2d at 638.

In this instance, if the cancelled checks were in Ferrandi's custody and if he were summoned to produce them, these elements of compulsion would be present.

Furthermore, the Government is foreclosed from arguing that Ferrandi could later move to suppress the cancelled checks or object to their introduction into evidence, if the Government sought to use the checks against him in a criminal prosecution after being compelled to produce them. In Maness v. Meyers, supra, the Supreme Court said that these safeguards were inadequate because Ferrandi "would be forced to surrender the very protection

which the privilege is designed to guarantee." 419 U.S. at 462, 95 S.Ct. at 593. Ferrandi cannot be forced to "...let the cat out' with no assurance whatever of putting it back." 419 U.S. at 463, 95 S.Ct. at 593. See also United States v. Harper, 397 F. Supp. 983 (E.D. Pa. 1975).

On the basis of this discussion, Werner respectfully submits that if the cancelled checks were in Ferrandi's custody, Ferrandi would be privileged from producing them pursuant to an Internal Revenue Service summons, such as the one in this case (A-14), directed to him. In United States v. Judson, 322 F.2d at 466, the Government conceded as much.¹¹

B. WERNER HAS STANDING TO ASSERT THE TAXPAYERS' FIFTH AMENDMENT RIGHTS.

In enforcing the Summons herein (A-14), Judge Cooper rejected Werner's contention that, in so doing, the Fifth Amendment rights of the taxpayers would be violated. Judge Cooper, quoting Fisher v. United States, 425 U.S. 391, 397 (1976), held:

"The taxpayer's privilege under this Amendment [Fifth] is not violated by enforcement of the summonses involved in these cases

¹¹ This concession raises serious collateral estoppel implications for this case.

because enforcement against a taxpayer's lawyer would not 'compel' the taxpayer to do anything -- and certainly would not compel him to be a 'witness' against himself." (A-37).

Judge Cooper's Memorandum and Order seems to hold that when the documents summoned are not in the possession of the person whose Fifth Amendment rights would be violated by their production, that person's rights can never be asserted vicariously. Werner submits that Ferrandi's Fifth Amendment rights would be violated by enforcement of the Summons herein and that he has standing to assert Ferrandi's rights. Werner contends that the holding in Fisher v. United States, supra, is limited to the facts of that case. Werner agrees that under the facts of that case the taxpayers' Fifth Amendment rights were not violated by their being compelled to produce the records of their accountants (i.e., records that were not their personal or private records).

Werner further submits that there are very significant factual differences between this case and Fisher v. United States, supra, which render the latter insufficient authority for the proposition that enforcement of the within Summons would not violate Ferrandi's Fifth Amendment rights under the facts of this case. The crucial distinction between the factual settings of these cases is in the character of the documents summoned.

In Fisher v. United States, supra, the documents summoned were papers prepared by the taxpayers' accountants, in the accountants' own hand, and, which were the property of the accountants and not the taxpayers. In this instance, the documents summoned are cancelled checks drawn on certain personal accounts of the taxpayer, Mr. John Ferrandi. These documents, in contrast, are the personal property of the taxpayer and are written in the hand of the taxpayer. In this regard, the facts of this case are more closely analogous to the facts of Couch v. United States, supra.

In Couch v. United States, supra, an Internal Revenue Service Agent summoned a taxpayer's accountant to produce the records relating to the taxpayer's tax liability then in the possession of the accountant. The records in the possession of the accountant on the date the summons was served included cancelled checks drawn on the taxpayer's accounts and other records concededly owned by the taxpayer.

Before the date on which the summons was returnable, the taxpayer caused these records to be transferred to her attorney and sought to claim the protection of the attorney-client privilege. The Supreme Court, in a footnote (409 U.S. at 329, 34 L.Ed.2d at 554), rejected the taxpayer's effort to enlarge her constitutional rights in this way. The Court held that the taxpayer's rights were fixed as of the date on which

the summons was served and that the case would be decided as if the records were still in the hands of the accountant. The Court refused to hold that the taxpayer's Fifth Amendment rights would be violated by the enforcement of the summons against the accountant. However, in doing so, the Court distinguished the facts of Couch v. United States, supra, from the facts of Donaldson v. United States, 400 U.S. 517, 27 L.Ed.2d 580 (1971). The same distinction holds with respect to the difference between this case and Fisher v. United States, supra. In Donaldson v. United States, supra, the taxpayer had no proprietary interest in the documents summoned, while in Couch v. United States, supra, and here the taxpayer had just such an interest.¹²

The summons in Couch v. United States, supra, was enforced because the documents were in the possession of the

¹² It is for this reason that the Supreme Court in Couch v. United States, supra, was careful to indicate that the accountant was an agent, and not an employee, of the taxpayer. If the accountant had been an employee of the taxpayer, the Court would have necessarily had to analyze the facts to determine if the records were constructively possessed by the taxpayer, even though actually possessed by the employee-accountant. 409 U.S. at 333-334, 34 L.Ed.2d at 556-557. This distinction is not relevant in this instance, as will be shown below, due to the existence of the attorney-client relationship between the taxpayers and Werner.

accountant and not the taxpayer. The Supreme Court stated:

"It is important to reiterate that the Fifth Amendment privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him." 409 U.S. at 328, 34 L.Ed.2d at 554 (emphasis in original).

The Supreme Court thereafter set forth the oft-quoted language of Mr. Justice Holmes from Johnson v. United States, 228 U.S. 457, 458, 57 L.Ed. 919 (1913):

"'A party is privileged from producing the evidence but not from its production.'"

In Couch v. United States, supra, the Supreme Court noted that the ingredient of personal compulsion against the taxpayer was lacking. Only the accountant was compelled to do anything. The taxpayer was not forced to "testify" in any way against herself. Clearly, in Couch v. United States, supra, the accountant could have been forced to testify as to the receipt of the records, including cancelled checks, from the taxpayer and as to the contents of those records. The taxpayer could not have suppressed this testimony, because federal law does not recognize an accountant-client privilege. Couch v. United States, 409 U.S. at 335, 34 L.Ed.2d at 558. As Mr. Justice Brennan noted in his concurring opinion in Couch v. United States, supra, it would be unwise for federal law to recognize such a privilege, since an accountant is obligated to

prepare a complete and lawful tax return. As opposed to an attorney-client relationship, there is no element of confidentiality in the accountant-client relationship. To the contrary, one retains the services of an accountant to make a full public disclosure of his financial activities and resulting tax liability for a particular period of time.

Since no accountant-client privilege exists under federal law, the Supreme Court in Couch v. United States, supra, was not forced to determine whether the documents summoned would have been privileged in the hands of the taxpayer. The finding that the accountant was an agent, as opposed to an employee, of the taxpayer was significant in this context. If the accountant had been an employee of the taxpayer, the Court would have necessarily had to analyze the facts to determine if the records were constructively possessed by the taxpayer, even though actually possessed by the employee-accountant. 409 U.S. at 333-334, 34 L.Ed.2d at 556-557.

The Court in Couch v. United States, supra, did not hold that the records would not have been privileged in the hands of the taxpayer. In fact, since the records (or, at least, the cancelled checks) were the personal property of the taxpayer, written in her own hand, it is submitted that these records would certainly have been privileged in the hands of the

taxpayer. See POINT I, sub. A., supra.

If the person summoned in Couch v. United States, supra, had been the taxpayer's attorney from whom she had sought advice on the tax matters in question, then the case would have been factually indistinguishable from this case. In Fisher v. United States, supra, the Supreme Court held that the summoned documents:

"...if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege." 425 U.S. at 404, 48 L.Ed.2d at 52.

The Supreme Court analyzed the issue in the following language:

"This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice.... The purpose of the privilege requires no broader rule. Pre-existing documents obtainable from the client are not appreciably easier to obtain from the attorney after transfer to him. Thus, even absent the attorney-client privilege, clients will not be discouraged from disclosing the documents to the attorney, and their ability to obtain informed legal advice will remain unfettered. It is otherwise if the documents are not obtainable by subpoena duces tecum or summons while in the exclusive possession of the client, for the client will then be reluctant to transfer possession to the lawyer unless the documents are also privileged in the latter's hands. Where the transfer is made for the purpose of obtaining legal advice, the purposes of the attorney-client privilege would be defeated unless the privilege is

applicable. 'It follows, then, that when the client himself would be privileged from production of the document, either as a party at common law... or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce.' 8 Wigmore, §2307 p. 592." 425 U.S. at 403-404, 48 L.Ed.2d at 51-52 (emphasis in original).

Thereupon, the Supreme Court in Fisher v. United States, supra, undertook an examination of whether the documents summoned would have been privileged in the hands of that taxpayer. The Court concluded they would not and stated:

"A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications... The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him." 425 U.S. at 409, 48 L. Ed.2d at 55.

The Supreme Court continued:

"The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers

produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena... The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both 'testimonial' and 'incriminating' for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof. In light of the records now before us, we are confident that however, incriminating the contents of the accountant's workpapers might be, the act of producing them - the only thing which the taxpayer is compelled to do - would not itself involve testimonial self-incrimination." 425 U.S. at 410-411, 48 L.Ed.2d at 56.

In so holding, the Court relied on the fact that the papers belonged to the accountant and were prepared by the accountant. The taxpayer would not be forced to testify because his production of the accountant's papers would not authenticate or vouch for the truth of the information contained in the accountant's papers. Nor would the taxpayer be qualified to authenticate the accountant's papers, even if he were compelled to testify. The accountant would still be a necessary witness. He would

have to testify as to the accuracy of the papers and how they were prepared. 425 U.S. at 412-413, 48 L.Ed.2d at 57. In this case, the cancelled checks are Ferrandi's; they were prepared by him; and their compelled production would force Ferrandi to admit their existence, authenticate them, as well as attest to the truth of the contents of the cancelled checks.

The Court in Fisher v. United States, concluded:

"Whether the Fifth Amendment would shield the taxpayer from producing his own records in his possession is a question not involved here; for the papers demanded here are not his 'private papers', see Boyd v. United States, 116 U.S., at 634-635, 29 L.Ed.746." 425 U.S. at 414, 48 L.Ed.2d at 58.

It is precisely this issue facing the Court in this case.

In a case directly on point, although decided before Fisher v. United States, supra, the Ninth Circuit held that a taxpayer's cancelled checks drawn on his personal account were shielded from production pursuant to Internal Revenue Service summons by the Fifth Amendment. The Ninth Circuit further held that the protection was not lost when the taxpayer transferred his cancelled checks to his attorney to obtain legal advice. United States v. Judson, supra.

The Judson court stated:

"The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the [Fifth] Amendment's protection, and walked out with something less." 322 F.2d at 466.

"The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry." 322 F.2d at 467.

"The privilege must then be respected if the client himself could have successfully raised it." 322 F.2d at 467.

As the Ninth Circuit noted in United States v. Judson, supra, the very nature of the tax laws requires taxpayers to rely upon attorneys, and requires attorneys to rely, in turn, upon documentary indicia of their client's financial affairs. The Ninth Circuit felt constrained to reject the same position advanced by the Government herein. Of particular significance to this Court should be the fact that the Ninth Circuit's decision in United States v. Judson, supra, was cited with approval by the Supreme Court in Fisher v. United States, 425 U. S. at 404, 48 L.Ed.2d at 52.

In United States v. Beattie, 522 F.2d 267 (2nd cir.1975) (Friendly, J.), decided while Fisher v. United States, supra, was pending in the Supreme Court, this Court held that a taxpayer cannot refuse to turn over his accountant's workpapers in the taxpayer's possession when summoned by the Internal Revenue Service. This Court said:

"It is possible that the [Supreme] court may dispose of [Fisher v. United States and its companion cases] on the ground that, as in Couch v. United States,..., compulsory process did not run against the person claiming the privilege, without reaching the question whether the taxpayer could have sustained the claim of privilege if he had retained possession." 522 F. 2d at 269.

Of course, we now know the Supreme Court in Fisher v. United States, supra, did reach the question and held the taxpayer could not have sustained the claim of privilege, under the facts of that case, if he had retained possession. However, in footnote 16 (522 F.2d at 278), this Court did anticipate a distinction with the Couch case drawn by the Supreme Court in Fisher v. United States, supra. In that footnote, this Court was analyzing the application of the Fifth Amendment where possession and ownership of the documents summoned were not simultaneous. This Court opined:

"In Judson there was ownership and not possession, and the decision is wrong in light of Couch unless it matters that in Judson the papers, although unprotected by the attorney-client privilege, 322 F.2d at 463, were in the possession of a lawyer rather than an accountant." 522 F. 2d at 278.

In Fisher v. United States, supra, the Supreme Court did say that this distinction mattered.

Werner, therefore, submits that Ferrandi's cancelled checks drawn on his personal accounts would be privileged from production pursuant to Internal Revenue Service summons if they had been in Ferrandi's possession. Werner further submits that under Fisher v. United States, supra, this protection was not lost by Ferrandi's transfer of those cancelled checks to Werner, his attorney, for the purpose of obtaining legal advice.

POINT II

THE SUMMONS HEREIN WAS ISSUED IN BAD FAITH,
FOR AN IMPROPER PURPOSE AND IS, THEREFORE,
UNENFORCEABLE.

The Supreme Court in its decisions in the cases of Donaldson v. United States, supra, and Powell v. United States, 379 U.S. 48 (1964) set forth the requirements which must be met before the Internal Revenue Service can seek enforcement of its Summons in the United States District Court:

1. The Summons must be issued in good faith and for a proper purpose.
2. The Summons cannot be issued after a recommendation for criminal prosecution of the taxpayer.

The "recommendation for prosecution" referred to in Donaldson, supra, was concluded by that Court to have been made within the Internal Revenue Service. In the language of the Donaldson decision:

"We further bear in mind that the Service has District Offices, each with an audit division and a criminal division; that the Audit Division's program emphasizes the civil aspects of enforcement but embraces 'participation with special agents of the Intelligence Division in the conduct of tax fraud investigations.' §1118.4; that the Intelligence Division enforces the criminal statutes . . . , §1118.6; that each assistant

regional commissioner for intelligence . . .
'approves or disapproves recommendations for
prosecution,' §1114(10); and that
recommendations for prosecution are pre-
cessed through the office of regional counsel and
by that office to the Department of Justice,
§1116(3). This demonstrates that the special
agent may well conduct his investigation jointly
with an agent from the Audit Division; . . .
and that any decision to recommend prosecution
comes only after the investigation is complete or is
sufficiently far along to support appropriate
conclusions." 400 U.S. at 534-35, 91 S.Ct. at
544 (emphasis added)

The above-quoted summary of Internal Revenue Service procedure makes it clear that a "recommendation for prosecution" must have already been made for it to be approved or disapproved by the assistant regional commissioner for intelligence and for such recommendations for prosecution to be "processed through the office of regional counsel and by that office to the Department of Justice."

Although Werner admits there is no evidence in the record on appeal which indicates that a recommendation for criminal prosecution against the taxpayers is outstanding or pending, Werner submits that the Summons could still have been issued in bad faith, for an improper purpose and, therefore, be enforceable. United States v. LaSalle National Bank, 554 F.2d 302 (7th Cir. 1977).

In the alternative, Werner submits that if these facts do not support a finding of bad faith in the issuance of the Summons, they at least support a finding that Werner had grounds to reasonably believe the Summons was issued in bad faith. On this basis, Werner submits that the Civil Subpoena served on Jordan (A-49) should have been enforced prior to Judge Cooper's decision to enforce the Summons herein. See POINT III; infra.

POINT III

THE CIVIL SUBPOENA SERVED ON JORDAN
SHOULD HAVE BEEN ENFORCED PRIOR TO
JUDGE COOPER'S DECISION TO ENFORCE THE
SUMMONS HEREIN.

The Courts have held that a taxpayer is entitled to examine or depose the Internal Revenue Service Agent issuing the summons on behalf of the Internal Revenue Service. The summoned party should be permitted to investigate the purpose for the issuance of said summons where such purpose has been put in issue and may affect the legality of the summons. United States v. LaSalle National Bank, *supra*; United States v. Nunally, 278 F. Supp. 843 (W.D. Tenn., W.D., 1968); United States v. Moriarity, 278 F. Supp. 187 (E.D. Wis. 1967); Kennedy v. Rubin, 254 F. Supp. 190 (N.D. Ill. E.D., 1966); Weir Foundation v. United States, 29 AFTR 2d 72-1225. (S.D.N.Y. 1972).

It is impossible for Werner to offer further proof with respect to his good faith belief that the Summons herein was issued in bad faith. Since the Government has already served the taxpayers with a detailed Notice of Deficiency for the 1972 tax year (A-58), Werner must assume that, at least with respect to the 1972 tax year, the documents summoned are not vital or necessary to the Government's civil tax case

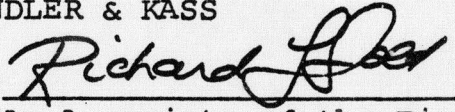
against the taxpayers. Werner should have been given an opportunity to examine Jordan and the relevant records and documents of the Government to determine whether his reasonable belief that the Summons was issued in bad faith was the fact. The letter from Assistant United States Attorney Kelleher (A-51), who was not conducting the tax investigation, was hardly a suitable substitute to the taking of Jordan's sworn testimony.

CONCLUSION

WHEREFORE, the Respondent-Appellant William J. Werner asks this Court to reverse the Memorandum and Order of the Honorable Irving Ben Cooper, U.S.D.J., dated November 17, 1977 and to refuse to enforce the Internal Revenue Service Summons served on the Respondent-Appellant William J. Werner. In the alternative, and if this Court should decide to affirm the aforementioned Memorandum and Order of Judge Cooper, the Respondent-Appellant William J. Werner asks this Court to grant a stay of execution of the aforementioned Memorandum and Order of Judge Cooper and permit the Respondent-Appellant William J. Werner to retain possession of the documents summoned during the period allowed by law for the Respondent-Appellant William J. Werner to petition the Supreme Court of the United States for a writ of certiorari and, if such a petition is filed, until the Supreme Court makes a determination with respect to such petition, lest such an application be rendered moot.

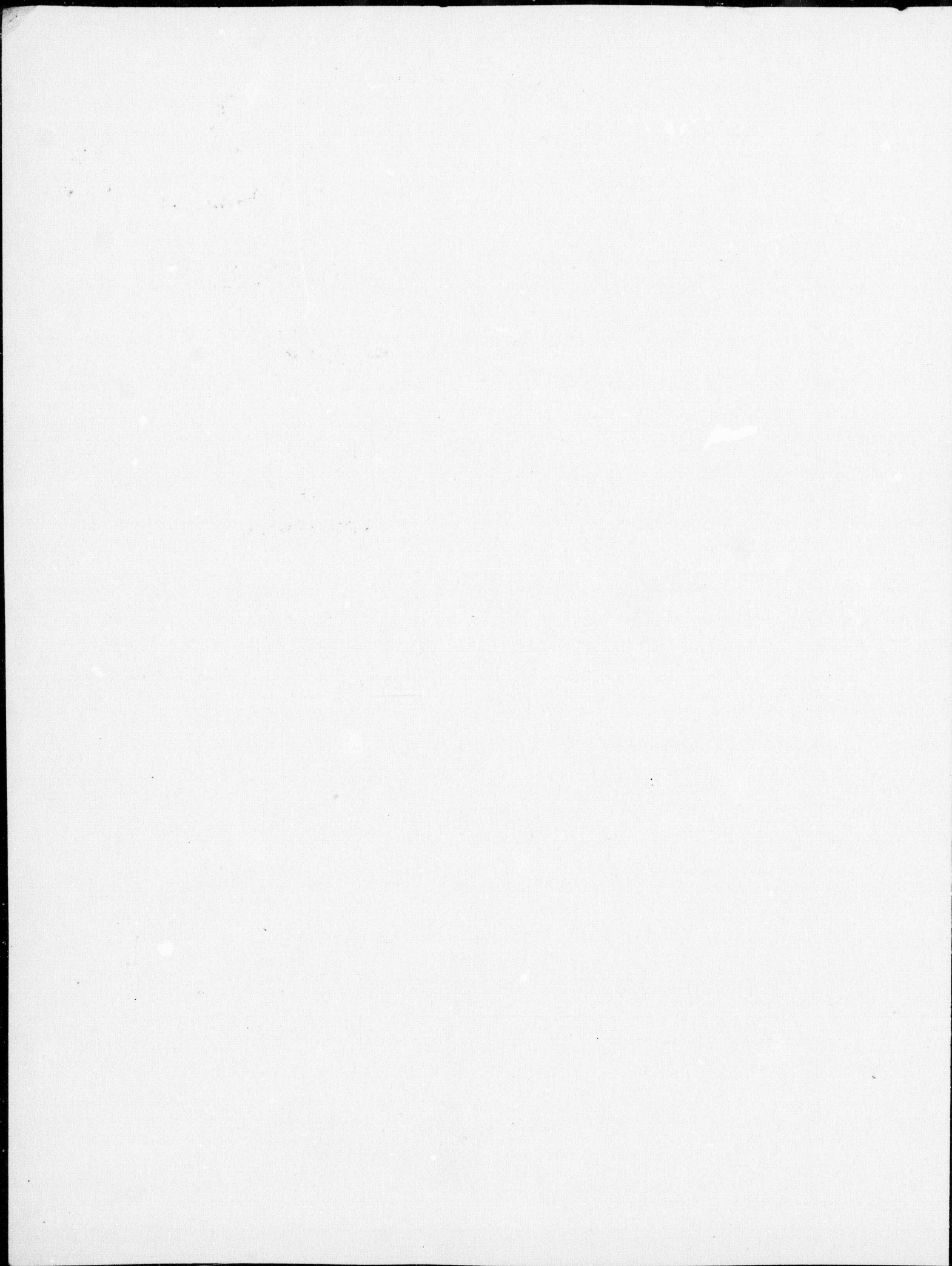
Respectfully submitted,

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By _____ District of N.Y.

ROBERT B. FISKE JR.

